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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

Appeal from

The Court of Appeals of Franklin County, Ohio

MINNIE R. DeLAY and CLIFTON DeLAY

Petitioners

vs.

DANIEL W. MANES

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

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To the Honorable
The Supreme Court of the United States:

The petition of Minnie R. DeLay, et al respectfully shows to this Honorable Court that this action originated before a judge of the Court of Common Pleas of Franklin County, Ohio, for the apportionment of the award of $44,500.00 the verdict of the jury in a prior condemnation proceedings, in the Court of Common Pleas, Franklin County, Ohio.

The petitioners were the owners and lessors of the land involved, the same being located near the intersection of Broad and Sandusky Streets, main arteries for travel in the City of Columbus, Ohio, and readily accessible to both retail and manufacturing areas. The appellee was the lessee of the land, who for the purposes of his business and under authority of the leasing agreement, removed two residence buildings from the premises and constructed a short-order type restaurant building upon the land, then installed black-top drives, sewer and water lines, driveway approaches, and a concrete retaining wall.

The leasing agreement was for a period of ten years, and had twenty-six months to run at the time of the condemnation. There was no renewal clause in the lease, but instead there was an option to purchase in appellee at the stated price of $24,000.00. The lease also gave to lessee the right to remove buildings, the pertinent section reading as follows:

> "The buildings that are hereafter erected upon said premises by the lessee shall be and remain the property of the lessee and at the termination of this lease or anytime prior thereto, he may remove, sell, or dispose of said buildings, and they shall at all times be and remain his property."

By statute, juries in Ohio do not in condemnation proceedings concern themselves with the respective rights or interest in the property condemned, but concern themselves only with the market value of the property as a whole, or with what the condemning authority must pay for the property. The value of the various rights or interests in property is determined in a separate apportionment proceeding as in the instant proceeding. The holders of varying interest are, in fact, co-defendants in condemnation proceedings.

In the Court of Common Pleas, the appellee produced no evidence relative to the value of his leasehold interest in the premises. Your petitioners went forward calling as a witness one Bruce Lowman, an expert in the field of property appraisals. Mr. Lowman's qualifications as an expert were stipulated by counsel for the parties.

Mr. Lowman testified in substance that the value of the bare land was in the amount of $36,000.00; the value of all of the structures including black-top drive, sewer lines, driveway approaches, concrete retaining wall and the building was in the amount of $25,500.00; that the building, itself, was worth $9,540.00, and the various

items of equipment in and around the buildings such as a cooler, floodlight and poles, electrical systems, electrical appliances, the sign "Dan's Drive-In," counters, stools, and booths were of a value of an additional $7,080.00.

Appellees introduced no contradictory testimony or evidence. The Court of Common Pleas in apportioning the award, gave to the lessee, appellee, $15,518.00, and to the lessor the balance of $28,962.00, or gave to the lessee the value of the buildings alone, less one-half of their value, a subtraction the Court justified on the theory that the building being of cement block construction could not be removed, and the fact that the valuation of the building was enhanced by its location on the particular property. The Court then also gave to the lessee, an additional amount as rental adjustment for the remainder of the term of the lease.

The appellee on appeal to the Court of Appeals de novo, introduced no evidence, thus submitting his case on the evidence taken below, and making of Mr. Lowman, his witness.

Included in the testimony taken in the Court of Common Pleas was the testimony of a deputy auditor of Franklin County, whose testimony was to the effect that the County Auditor on his records, carried the valuation of the improvements such as the black-top drive and so forth, along with his valuation of the buildings rather than with the land. Included in the lease was the provision that the lessor would pay taxes on the land and the lessee would pay taxes on the building. The lessee was, of course, in Court, yet he neither gave nor produced any testimony or other evidence that would in any way indicate that the parties either at the time of the execution of the lease or at any time subsequent considered the word, "building," as used in such lease to mean anything more than is included in the ordinary and usual meaning of the term,

or at any time considered there was to be a right in the lessee to remove such things as blacktop drives, driveway approaches, sewer lines, concrete block retaining walls and other such items. There further was no evidence produced that either of the parties had any knowledge as to how the County Auditor was carrying the property on the grand duplicate, nor had any knowledge as to what items of property they were paying taxes on.

On such evidence the Court of Appeals held that the term, "building," as used in the lease included the building and improvements and that the appellee lessee was the owner of the building and the improvements, and had a right to recover for their value.

The Court of Appeals then disregarded entirely the testimony of Mr. Lowman relative to the value of the various items of property and determined the division of the award should be made in accordance with the findings of the jury in the condemnation proceedings. The jury had determined that the building and improvements were of value of $25,500.00, and the bare land was of a value of $20,000.00. The Court of Appeals further disregarded the fact that the jury's valuation of the building and improvements included the amount that such building and improvements were enhanced by the fact of their being situated on this particular land.

After thus finding specifically that the lessee-appellee was the owner of the building and improvements and was to receive full compensation for their market value and specifically finding that the value of the bare land was in the amount of $20,000.00, the Court of Appeals gave to the lessee-appellee the additional amount of $5,850.00 supposedly representing a rental adjustment of the remainder of the term of the lease This the Court did in the complete absence of any evidence that the rental value of the land alone which, of course, was the subject of the

lease had any greater rental value at the time of the condemnation proceedings than the $175.00 per month being paid as rent therefor. The effect, of course, was to make the lessee-appellee, both owner and lessee, and gave to such lessee-appellee money to which he was in no wise entitled. The $5,850.00 was entirely taken from the amount specifically stated by the Court to be the value of the petitioners bare land.

It is universally held that the right to a rental adjustment is dependent upon an obligation to pay rent and that if recovery is warranted, such recovery should be the difference between the amount of rent to be paid and the present rental value of the property leased. It is further universally held that an owner can recover only the market value of the property taken.

Petitioners filed an appeal to the Supreme Court of Ohio as of right, claiming that the decision of the Court of Appeals of Franklin County, Ohio was a taking of property without due process guaranteed by the Constitutions of the State of Ohio and of the United States. Petitioners further filed a motion for certiorari on the theory that the matter was one of great and general public interest. The Supreme Court of Ohio denied the appeal and the writ on March 23, 1961.

ASSIGNMENTS OF ERROR

Your petitioner assigns as error:

1. The taking by the Court of Appeals of Franklin County, Ohio the sum of $5,850.00, the same being a part of $20,000.00 declared by the Court to be the value of the land of the lessor-petitioner and the giving of the same to the lessee without basis in fact or law, and contrary to the due process clause of both the Ohio and United States Constitutions.

2. The refusal of the Court of Appeals of Franklin County, Ohio to make a determination as to the value of the respective rights and interests in the property based on the evidence presented, such evidence being uncontradicted and presented to said Court by both parties.

3. The Court of Appeals determination that the value of the respective rights and interests in the property were such as found by the jury in the condemnation proceedings, where the parties were not adversaries but co-defendants, and in which proceedings the jury, in making its determination as to the value of the buildings and improvements, included a sum by which such building and improvements were enhanced by virtue of the fact of their being located on the particular land; when there being no evidence in the record in the proceedings before such Court that would support the Court in finding such valuations to be as the jury found.

4. The determination by the Court of Appeals of Franklin County, Ohio that the parties by their acts modified their contract of lease so as to give to the term "building" as used in the provision granting lessee-appellee a right of removal of buildings to include all improvements without testimony or other evidence that such was ever in the minds of the parties.

BASIS FOR JURISDICTION

Your petitioner is advised and believes that the said judgment of the Court of Appeals of Franklin County, Ohio is erroneous to such extent as to be arbitrary and capricious; that the same is not based upon the evidence produced; and is a taking of property without due process of law, guaranteed by Amendment 14, Section 1 and Amendment 5 of the United States Constitution and that this Honorable Court should require this said case to be certified to it for its review and determination in conformity with the provisions of Title 28, Section 1257, United States Code, the pertinent parts of which read:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "(3) By writ of a certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

FEDERAL QUESTION RAISED IN STATE COURT

The question of the deprivation of the due process of law under the Constitution of the United States was raised on appeal as of right from the decision of the Court of Appeals of Franklin County, Ohio to the Supreme Court of the State of Ohio filed April 6, 1960.

REASON FOR GRANTING THE WRIT

Assignment of Error No. 1

The taking by the Court of Appeals of Franklin County, Ohio the sum of $5,850.00, the same being a

part of a $20,000.00 declared by the Court to be the value of the land of the lessor-petitioner and the giving of the same to the lessee without basis in fact or law, and contrary to the due process clause of both the Ohio and United States Constitutions.

We feel that on this assignment we need only point out to this Honorable Court that the leasing was of the land only and that the $5,850.00 was to have represented the rental value of the land, the building, and improvements for the remainder of the term of the lease; and that it is arbitrary, capricious and contradictory to the point of being a deprivation of due process to hold that the declared owner of the building and improvements should receive in addition to the full market value of such building and improvements, the rental value thereof; that such recovery should come not from that part of the fund representing the building and improvements, nor even out of the total award but should come entirely from that part of the fund representing the land only.

We repeat that there was no evidence in the record to the effect that the rental value of the land alone had increased or was any different than the $175.00 that appellee was obligated under the lease to pay for the rental of such land.

The only fact pattern that would in any way justify a payment of a rental adjustment to appellee would be a finding by the Court that the building and improvements by virtue of the remainder interest of your petitioners in the lease and the impossibility of removal because of materials used in construction, inured to your petitioners upon the termination of the lease by condemnation.

Assignment of Error No. 2

The refusal of the Court of Appeals of Franklin County, Ohio to make a determination as to the value of the respective rights and interests in the property on the

basis of the evidence presented, such evidence being uncontradicted and presented to said Court by both parties.

We believe that due process not only demands that a party be afforded an opportunity to present evidence but demands also that the issues be determined on the evidence presented. The right to produce evidence would be a nullity, if this did not follow.

Although we feel it unnecessary, we refer the Court to the case of Baltimore & Ohio Railroad Company vs. United States, et al. 298 U.S., page 349, in the opinion of which case on page 368 the following is found:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved that includes the right to introduce evidence and have judicial findings based upon it."
>
> Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 387; Bluefield Water Works, Co. v. Public Service Commission, 262 U.S. 679, 689; Dayton-Goose Creek Ry. v. United States 263, U.S. 456, 485-486; Ohio Utilities Co. v. Utilities Commission 267, U.S. 359, 364; Lehigh Valley R. Co. v. Utility Commissioner, 278 U.S. 24, 36-41; United Railways v. West, 280 U.S. 234;

and to the case of Postal Telegraph Cable Company, 247 U.S. 464, in which case in the course of its opinion on page 473, this Honorable Court stated:

> "But the question arises whether the basis of fact upon which the state court rested its decision denying asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

and to the case of Southern Pacific Company v. Schugler, 227, U.S. 601 Syllabus 5 of which reads;

> "On writ of error to a state court, while this court does not ordinarily review findings of fact, if a Federal right has been denied as the result of a finding of fact, which is without support in the evidence; this court may examine the evidence to the extent necessary to give plaintiff in error the benefit of the Federal right asserted."

and to the case of American Rio Grande Land and Improvement Co., 21 Fed. Supp., page 492, Syllabus 5 of which reads:

> "Due process' includes and means an opportunity to be heard and a resultant action in conformity with the truth deduced at such hearing."

We again point out to the Court that there was the testimony of only one witness on the matter of valuation, that his qualifications were stipulated, that he was produced originally in the Court of Common Pleas by your petitioner, that on appeal de novo to the Court of Appeals appellee submitted this testimony as a part of the record on which he wanted to stand, thus making such witness his own; there was nothing to contradict his testimony; and there was no testimony, not even as much as a sufficient description of the property upon which the Court of Appeals could have made an independent finding as to values, and particularly there was none upon which they could make a finding identical to that of the jury in the condemnation proceedings.

We, of course, further point out to the Court that in the condemnation proceedings the issues were different, and the parties were different.

Assignment of Error No. 3

The Court of Appeals determination that the value of the respective rights and interests in the property were such as found by the jury in the condemnation proceed-

ings, where the parties were not adversaries but co-defendants, and in which proceedings the jury, in making its determination as to the value of the buildings and improvements, included a sum by which such building and improvements were enhanced by virtue of the fact of their being located on the particular land; there being no evidence in the record in the proceedings before such Court that would support the Court of such valuations to be as the jury found.

The same argument as above would apply here.

Assignment of Error No. 4

The determination by the Court of Appeals of Franklin County, Ohio that the parties by their acts modified their contract of lease so as to give to the term "building" as used in the provision granting lessee-appellee a right of removal of buildings to include all improvements without testimony or other evidence that such was ever in the minds of the parties.

We believe that this finding of the Court is also arbitrary and capricious to the point of being a deprivation of due process. As argued above, due process demands a decision be based upon the evidence presented and certainly it follows that such evidence must be substantial. The very best that could be said for the determination of the Court in this matter, based upon the testimony of the Deputy Auditor is that such determination was an inference based upon an inference which is contrary to the most basic rules of evidence and a deprivation of procedural due process.

We, of course, remind the Court that the appellee was in Court and said or produced not one word to the effect that anything more than buildings were contemplated in the clause in the lease granting the right of removal of the buildings.

We further point out to this Honorable Court that the only possible logical inference that could be drawn from any of the evidence would be that the parties did not and could not have contemplated at the time of the signing of the lease or at any time subsequent, that such things as a blacktop drive, driveway approaches, sewer lines, concrete retaining walls and other such items would ever be removed from the premises.

We further believe that the combination of errors apparent in the decision of the Court of Appeals of Franklin County, Ohio, has in fact obliterated the contract between the parties and made this decision so inequitable as to be an arbitrary taking of property without due process.

Further the law cited by the Court of Appeals in supposed support are from cases between a condemning authority and a lessee and not applicable to the instant case.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Franklin County, Ohio, commanding the said Court to certify and to send to this Court on a day certain to be therein designated a full complete transcript of the record and all proceedings of the said Court of Appeals in said case, to the end that said case may be reviewed and determined by this Court as provided by U. S. Code Title 28, Section 1257, Judicial Code, and that the said judgment of said Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

Carlene Deputy Chester

Petitioner

By George E. Tyack

Their Attorney

APPENDIX

AMENDMENT FOURTEEN, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT FIVE, PARAGRAPH 2 OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO, STATE OF OHIO

v.

Minnie R. DeLay and
Clifton DeLay
Lessor-Appellees
and
Daniel W. Manes
Lessee-Appellant
No. 6223

(In the Matter of the Appropriation by the State of Ohio of an Easement for Highway Purposes Over the Lands of DeLay, et al., on State Route No. 3, Section 13.93., Franklin County, Ohio)

ENTRY

This cause came on to be heard upon the appeal on questions of Law and Fact from the judgment of apportionment by the Court of Common Pleas, and the evidence, the original papers and, pleadings, and the briefs and arguments of counsel. Upon consideration thereof, this Court finds and determines:

(1) The Jury in the Court of Common Pleas awarded compensation in the sum of $20,000 for the value of the land and in the sum of $24,500 for the value of the structures, making total compensation awarded by the jury in the sum of $44,500.

(2) The lessors (the appellees in this Court) are entitled to $14,150 of the total award and the lessee (The appellant in this Court) is entitled to $30,350 of the total award.

This Court coming on to render the judgment of apportionment which the Court of Common Pleas could and should have rendered.

IT IS ORDERED ADJUDGED AND DECREED BY THE COURT,

(a) That lessor-appellees (G. Arlowe Bryant, executor of the estate of Minnie R. DeLay, and Clifton A. DeLay) have and recover $14,150 of the total award of $44,500;

(b) That lessee-appellant (Daniel W. Manes) have and recover $30,350 of the total award of $44,500.

It appeared to the Court that by agreement of the parties, lessor-appellees have withdrawn $12,500 of the total award and lessee-appellant has withdrawn $12,500 of the total award, it is ordered that lessor-appellees re-

ceive $1,650 of the balance and the lessee-appellant receive $17,850 of the balance.

It is further ordered by the Court that the appeal bond given by lessee-appellant be and it is hereby released and discharged.

The costs of this appeal including the cost of transcript of testimony are adjudged agains lessor-appellees.

This case is sent to the Common Pleas Court for the enforcement of the judgment of this Court.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO, STATE OF OHIO

vs

Minnie R. DeLay and Clifton DeLay
Lessor-Appellees
and
Daniel W. Manes
Lessee-Appellant
No. 6223

In the Matter of the Appropriation by the State of Ohio of an Easement for Highway Purposes over the Lands of DeLay, et al., on State Route No. 3, Section 13.93, Franklin County, Ohio.)

OPINION

Rendered on December 1, 1959

WISEMAN, P.J., of the Second District, sitting by designation.

This is an appeal on questions of law and fact from a judgment of the Common Please Court of Franklin County apportioning between the lessor and lessee the jury award returned in an action to appropriate land for highway purposes.

The property was owned by the DeLays, hereinafter referred to as the lessor, who on June 19, 1950 leased the property to Manes, hereinafter referred to as the lessee, for a period of ten years. At the time of the appropriation the lessee was in possession under the lease, which then had twenty-six months more to run.

The total compensation awarded by the jury was $44,500.00. An award of $20,000.00 was given for the value of the land and $24,500.00 for the value of the structures.

The lessee was a party to the appropriation proceedings and filed a petition for apportionment of the award, between the lessor and lessee. Some additional evidence

was submitted to the court after the jury returned its verdict. The appellant, the lessee, elected to submit to this Court, in conformity to Rule V, Section A, paragraph 2 of the Rules of the Courts of Appeals, all the evidence received in the trial court taken before the jury and the evidence presented at the subsequent hearing.

At the subsequent hearing the lease was presented in evidence, certain pertinent facts were stipulated by counsel, and the testimony of several witnesses was taken.

At this hearing it developed that in 1950 when the lease was executed the property was occupied by two old residences which were torn down by the lessee, and a considerable amount of dirt was removed to bring the level of the land to street grade. The lessee erected thereon a drive-in restaurant with all modern equipment and facilities, he excavated a basement, built a retaining wall, provided for driveways across the curb and sidewalk, installed underground sewers and wiring, blacktopped the entire parking area, built barricades and fences and erected several sign posts. The lessee was operating the restaurant at the time of the appropriation.

The lease provided for the payment of $175.00 per month rental. The evidence was undisputed that the lessee would be compelled to pay a rental of $400.00 per month for a comparable property for the remainder of the term. It is conceded that lessee is entitled to the sum of $225.00 per month for the remainder of the term, or a total of $5,850.00 as compensation for the termination of the lease.

The lease contains certain clauses which are pertinent and significant as follows:

> "It is agreed that lessee shall have the right to remove, alter, remodel, sell or destroy any and all buildings now located upon said premises and shall also have the right to erect and maintain upon said premises at his own expense, and in his sole discre-

tion, such additional buildings as he shall erect.

"It is further agreed that Lessor shall pay taxes covering the land hereby leased, provided however, that should lessee erect any further or additional buildings upon said premises during the term heerof, the lessee shall, in addition to the monthly rental provided, pay also such taxes as shall be assessed against leased premises and allocable to any such building or buildings erected by lessee upon said premises.

"At any time during the term hereof, but in no event before June 26, 1955, lessee shall have the right to purchase the premises leased hereby at a consideration of Twenty-four Thousand Dollars ($24,000.00) said purchase price to be paid in cash upon delivery to lessee, by lessor, of a warranty deed and abstract of title showing a merchantable title to said premises in lessor."

"The buildings that are hereafter erected upon said premises by the lessee shall be and remain the property of the lessee and at the termination of this lease or anytime prior thereto, he may remove, sell or dispose of said building, and they shall at all times be and remain his property."

In strict conformity with the terms of the lease the lessee removed all structures on the property at the time the lease was executed. He erected new buildings and structures thereon. The lessee paid the expense of the removal of the old and the erection of the new buildings and structures. The evidence shows that the lessee was assessed for taxes on the tax value of all new buildings and structures. The lessor paid the taxes on the bare land. By the terms of the lease, the lessee was the owner and had the right to remove all new buildings and structures

erected by him. At no time did the lessee attempt to exercise the option to purchase the property as provided in the lease.

The lessor and the lessee agreed for tax purposes that the lessee should be regarded the owner of not only the buildings in which the restaurant was operated but that all other so-called site structures should be considered as property of the lessee. At the last hearing the deputy auditor testified that the sewers, asphalt pavement and other site improvements were included in the building value for tax purposes on which the lessee paid the taxes; that the lessor was taxed on bare land. Consequently, by their acts and conduct the lessor and lessee have interpreted the word "buildings" as used in the lease to include site structures.

The lessor contends that he is entitled to the full amount awarded for structures on the ground that certain site structures could not be removed, and further that unless removed by lessee, the structures would revert to lessor. The lessee contends that he is entitled to the total amount awarded for structures on the ground that such structures were paid for by lessee, that he was the sole owner of the structures and had the right of removal.

The case law in Ohio with respect to the rights of the parties under the factual development in the instant case is not well settled. Cases arising under the ordinary lease where the lessee is not given the right to erect buildings at his own expense and the right of removal, do not furnish a precedent and are of little or no help in resolving the question presented here. The cases of the Queen City Realty Co. v. Linzell, Director, 166 Ohio St., 249, 142 N.E. (2d), 219 and Frownfelter v. Graham, 160 Ohio St., 309, 54 N.E. 264, are not in point.

In the instant case three factors are present which are significant and controlling. (1) Erection of buildings at

the expense of lessee; (2) Retention of ownership in buildings and structures by lessee. 3. Right of removal of such buildings and structures by lessee. Text writers on the subject of eminent domain and the courts in other jurisdictions have established and approved the principle that where the lessee erects buildings and has the right of removal, the lessee, on the apportionment of an award, is entitled to that part of the award which has been allowed for the value of structures and buildings.

The lease being terminated by operation of law, the lessee is not entitled to any compensation for his option to purchase which had not been exercised.

In Nichols on Eminent Domain, Third Edition, Vol. 2, page 203, Section 5.81, the text is as follows:

> "It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land or puts fixtures into the building for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of a special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. This rule is, however, entirely for the protection of the tenant and cannot be invoked by the condemning party. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant."

In Vol. 18, American Jurisprudence, page 894, Section 234, the text is as follows:

> "Ordinarily an agreement between landlord and

tenant that the tenant shall have the right to remove improvements placed on the premises by him does not inure to the benefit of the condemner so as to authorize the taking of a beneficial use of the property from the tenant without making him a fair compensation for the property as a whole. Primarily the property is to be valued as a whole without regard to who put the buildings or fixtures there, or the right to remove them. But the right of the tenant to remove buildings or fixtures becomes material in apportioning a condemnation award between landlord and tenant."

In the case of United States of America v. Seagren, 75 A.L.B., 1491, 50 F. (2d) 333 (District of Columbia Court of Appeals) where the lessee built and conducted on the property a gasoline filling station, with the usual equipment of such an establishment, consisting of buildings, a work shop, underground tanks for gasoline and oil, with pipes, pumps, and other paraphernalia for the operation of the establishment, the lot being covered with a concrete surface or roadway and enclosed by an iron fence, and where the lease gave the tenant authority to erect buildings and other structures, etc., and to remove the same, the court held:

"The fact that a tenant, under the terms of the lease, has the right, upon the termination of his tenancy, to remove structures placed by him upon the leased premises, does not affect his right to claim payment of the present value thereof upon condemnation of the land."

The court in its opinion on page 1494 of Volume 75 A.L.R. cites with approval the quotation set forth above from Nichols on Eminent Domain. At the end of this case as reported in Vol. 75 A.L.R. there appears an extensive annotation on the subject of "right of tenant to remove

buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceedings." In the headnote on page 1495 is found this statement:

> "Without question the tenant in the reported case (UNITED STATES v. SEAGREN, ante, 1491) would have suffered a pecuniary loss if he had been compelled to protect his ownership of the filling station equipment consisting of divers tanks, pipes, pumps, and other paraphernalia, by removing the same from the premises and making what use he could of the equipment on other premises. Even though he might ultimately have had to vacate and salvage what equipment he could from the station, it was to his advantage to maintain his property in the condition in which it was installed so long as he had a right to occupy the premises."

In the annotation numerous cases are cited support the rule laid down in United States v. Seagren. In People v. Klopstock, 151 P. 2d, 641 (Supreme Court of California) where the tenant on the leased premises operated an asphalt plant and appurtenant facilities court held:

> "Fixtures are regarded as 'personally' as between tenant and owner of the land, so far as right of removal is concerned, but, as between tenant and condemning party, they are regarded as part of 'realty' for purpose of making compensation, so long as they remain fixtures, and whereby exercise of right of eminent domain they are destroyed or injured in value, damages may be recovered therefor by the tenant."

In City of Ladue v. St. Louis Public Service Co., 168 S. W. 2d, 966 (Missouri), where the tenant conducted a restaurant on the premises and was given the right to

remove the buildings erected by the tenant, the court in the fifth paragraph of the syllabus held:

> "Tenant having right under lease to remove buildings erected by her on land subsequently condemned by city was entitled to market value of buildings ascertained on the basis of what they were worth for the use to which they were devoted as they stood upon condemned land, and her participation in condemnation award could not be limited to salvage value or reduced by the cost of moving buildings."

In Queensboro Farm Products, Inc. v. State of New York, 161 N. Y. S. 2d, 989 (Court of Claims of New York), where the tenant owned a large building and other structures constituting a milk receiving plant located on leased lands, the court on page 994 said:

> "Claimant leased the land, but owned the improvements and fixtures thereon, under a lease giving to it the authority to remove such improvements and fixtures at the expiration of the lease provided the rent had been paid and the covenants of the agreement complied with. The rent had been paid and the covenants of the agreement complied with, and claimant's lease had not expired at the time of the appropriation. The claimant is entitled to be paid for its improvements and fixtures, which it had a right to remove at the end of the lease, and for the consequential damages thereto."

In the case of In re Appointment of Park Commissioner, Vol. 1, N. Y. Supp., page 763, where the lessee erected buildings and appliances for the purpose of conducting an ice house, the court held, in the second and third paragraphs of the syllabus, as follows:

> "2. In proceedings to condemn, for a public park, land in possession of a lessee for a term of years,

where the lessee has erected buildings on the land which would be part of the realty if the tenants owned the fee, the measure of damages to the lessee is the value of the buildings, though the lease stipulates that the lessee may remove the buildings at the end of the term.

"3. In such a case it is proper to deduct the sum awarded the tenants for their leasehold interest from the sum awarded the owners as the value of the soil, as the value of the land is all that can be awarded the owner, and the leasehold forms a part of it."

On pages 766 and 767 the court in discussing the amount of compensation to be allowed the lessee said:

"It is at once apparent that the buildings torn down are of much less value to the tenant than when standing. As they are now they may always remain; and thus the tenant, by this covenant, obtains the highest value contemplated by him at the time of the execution of the lease. When he is forced to part with his right, justice requires that he shall be compensated for all his damage as near as may be. Had he obtained title to the land, then no question would have arisen but that the measure of damage would be the value of the whole. As he is cut off from such right, or the possibility of it, the true measure of his damage would seem to be the value of his improvements, in addition to his leasehold interest. Such rule places the city in the precise position of the tenant. No reported case in this state is called to our attention, and none found after diligent search, where the right of the tenant to receive compensation for permanent improvements made by him upon leased land, taken by right of eminent domain, has been denied."

In the case of People v. Klopstock, supra, the court in its opinion on page 644 quoted from McAdam, Landlord and Tenant, fifth edition, section 10, pages 23-25, as follows:

> " 'The State's appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land whether classified as buildings or as fixtures. ° ° ° Trade fixtures are regarded as personally as between the tenant and owner (of the land) so far as the right of removal is concerned, but as between the tenant and the condemning party they are regarded as part of the realty for the purpose of making compensation, so long as they remain fixtures, and whereby the exercise of the right of eminent domain they are destroyed or injured in value, damages may be recovered therefor by the tenant. The award made for such fixtures in condemnation proceedings therefore belongs to the tenant. ° ° °
>
> " 'Where there is a condemnation of land, and also a destruction of a valuable plant erected by a tenant thereon, the value of the plant, even though not adding to the value of the land, must be awarded to the tenant. It is proper ° ° ° in condemnation proceedings, to make separate awards not only for the fee of the land, but to the lessee who has erected business buildings and a plant thereon.' "

It is well established that the right of eminent domain requires that the owner of property taken should be paid a just compensation for what is taken from him. The question is: what has the owner lost? The owner may be the owner in fee or the owner of a lesser estate such as the leasehold estate. What the owner of a lease loses by the appropriation proceedings should not inure to the benefit of the fee. The owner of the leasehold estate should be compensated for what he loses under the lease. In the

instant case the lessee was entitled to be compensated for his loss as his buildings and structures existed at the time of the appropriation and as used in his operation of his business of a drive-in restaurant.

Under the terms of the lease the lessee had the right to remove buildings and structures. Having granted to the lessee the right of removal of said buildings and structures the lessee would have had the right to remove the same even though it would have caused some slight damage to the real estate as it existed in the operation of the restaurant. The lessee is entitled to be compensated for such buildings and structures which he had the right to remove. In the instant case the lessee, in conditioning the property for the drive-in restaurant, was put to some expense in the removal of dirt and in lowering the grade of the property which does not enter into the award made for the land or for the structures. It appears from the record that the award of $24,500.00 for structures was for structures and buildings which the lessee under the terms of the lease was given the right to remove. In equity and justice the lessor in this case should have that portion of the total award which would represent the value of the bare land without any improvements, or $20,000.00 less $5,830.00, the value of the unexpired term of the lease.

In our judgment the great weight of authority supports the contention of the lessee that he is entitled to have apportioned to him the $24,500.00 awarded by the jury for structures as well as $5,850.00 which has been conceded to be the value of the unexpired term of the lease, or to have apportioned to him the total award of $44,500.00 the sum of $30,350.00.

An entry may be drawn accordingly.

CRAWFORD and KERNS, J.J., of the Second Appellate District, sitting by designation, concur.

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

In the Matter of the Appropriation by the State of Ohio of an easement for Highway Purposes over the lands of DeLay, et al. on State Route 3, Section 13.93,

Franklin County, Ohio

No. 199,278

ENTRY

This day this cause came on to be heard upon the motions of the parties for an order determining the interest of the fee holder, to-wit, the Estate of Minnie R. DeLay, and the lessee, Daniel W. Manes, in the award of $44,500.00 made in the condemnation proceedings filed in the within cause.

The parties appeared with counsel, testimony was taken, and briefs submitted by the respective parties.

From the evidence adduced, the Court finds that the lessee, Daniel W. Manes, had an interest in said total award in the amount of $15,518.00. It appearing that, by agreement of the parties, the said lessee has heretofore withdrawn from said award the sum of $12,500.00, it is ORDERED that the Clerk of Courts pay the sum of $3,018.00 to the said lessee, Daniel W. Manes, representing his total participation in the said award.

The Court further finds that the interest of the fee holder in said total award is in the amount of $28,982.00; that said fee holder has heretofore withdrawn the sum of $12,500.00 from said award, and it, therefore, is ORDERED that the Clerk of Courts, after deducting from said fee holder's interest any taxes chargeable against said fee holder and the aforesaid amount of $12,500.00

pay the remainder of said award to the said fee holder.

Exceptions to fee holder and lessee.

_____

Judge

Approved:
George E. Tyack

_____

Attorneys for Fee Holder

_____

Attorney for Lessee

COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

In the Matter of the Appropriation by the State of Ohio of an easement for Highway purposes over the lands of DeLay, et al. on State Route 3, Section 13.93, Franklin County, Ohio
No. 199,278

DECISION

Rendered this 16th day of March, 1959.

REYNOLDS, J.

This case is before the Court for the purpose of apportioning between the landlord owner and the tenant, the jury award for the appropriation of land for highway purposes.

The property involved is located at the intersection of Scott and Sandusky Streets in the City of Columbus and was owned by Minnie R. DeLay and Clifton DeLay, who on June 19, 1950, had leased the same for a period of ten years to Daniel W. Manes and who was occupying the premises at the time of the appropriation, under said lease which then had twenty-six months more to run.

Upon the trial of the appropriation case, the jury fixed the value of the land at $20,000.00 and the value of the structures at $24,524.00.

It is the claim of the lessor that the most that the lessee may be allowed out of the award is the value of the lease.

The monthly payments provided for being $175.00, payable on the first of each month during the term.

The further provisions and conditions are set out in the lease as follows:

> "••• yielding and paying monthly therefor, during said term the sum of One Hundred and Seventy-five and no/100 Dollars ($175.00) payable as follows: One Hundred Seventy-five Dollars ($175.00) on the

date possession of buildings now on premises is delivered to lessee and One Hundred Seventy-five Dollars ($175.00) on the same day each month thereafter during the entire term hereof.

"PROVIDED, however, that if said rent, or any part thereof, shall remain unpaid for 30 days after it shall become due, and without demand made therefor; or if said Lessee shall fail to keep and perform any of the terms, agreements and covenants in this Lease on Lessee's part to be kept and performed, it shall be lawful for said Lessee into said premises to re-enter, and the same to have again and repossess as in Lessor's first and former estate; and thereupon this Lease, and everything therein contained on the said Lessor's behalf to be done and performed, shall cease, terminate and be void.

"And said Lessee covenants and agrees with said Lessor as follows: That said Lessee will:

"Pay said rents in manner aforesaid, Use and occupy said premises in a careful, safe, lawful and proper manner, without waste; Not assign this Lease on said premises or any part thereof, without the written consent of said Lessor.

It is agreed that Lessee shall have the right to remove, alter, remodel, sell or destroy any and all buildings not located upon said premises and shall also have the right to erect and maintain upon said premises at his own expense, and in his sold discretion, such additional buildings as he shall erect.

"It is further agreed that Lessor shall pay taxes covering the land hereby leased, provided however, that should lessee erect any further or additional buildings upon said premises during the term hereof, the lessee shall, in addition to the monthly rental pro-

vided, pay also such taxes as shall be assessed against leased premises and allocable to any such building or buildings erected by lessee upon said premises.

"At any time during the term hereof, but in no event before June 26, 1955, lessee shall have the right to purchase the premises leased herby at a consideration of Twenty-four Thousand Dollars ($24,000.00) said purchase price to be paid in cash upon delivery to lessee, by lessor, of a warranty deed and abstract of title showing a merchantable title to said premises in lessor.

"The parties further agree that the rental is to begin under present Lease and when the present property is vacated and the tenants out of possession and occupancy delivered to Daniel W. Manes.

"The buildings that are hereafter erected upon said premises by the lessee shall be and remain the property of the lessee and at the termination of this lease or anytime prior thereto, he may remove, sell or dispose of said buildings, and they shall at all times be and remain his property."

There is a wide variance as to counsel's claims, the attorneys for the owner arguing that all the lessee should be entitled to is the damage suffered by him, represented by the difference in the rental under the lease and what he would be required to pay for comparable property elsewhere, and the depreciated value of the buildings and structures the lessor erected and installed on the premises.

According to the evidence of the only witness who testified on these points, the loss or damage arising from the termination of the lease is $5,850.00 made up from the difference between the rental of $175.00 per month as provided by the lease, and $400.00 per month which the witness stated would be the monthly rental for a

comparable property, and there being 26 months of the term remaining, plus the depreciated value of the improvements made by the lessee which the witness testified would be $3,324.00. So far as the Court can determine, the witness assumed that at the expiration of the term, the lessee could recover absolutely nothing for the improvements made.

Counsel in their briefs spend considerable time and cite a number of cases which can hardly be held to be in point, and which deal with situations where the Lessee has the right to remove the improvements made by him.

Neither counsel has stressed the express provision of the lease, which not only provides that the lessee may **remove,** sell or dispose of said buildings, (that is, those which he has built), but also provides that the same shall be and remain the property of the lessee, **and they shall at all times remain his property.**

That being true, how can it be concluded that at the end of the term they would have no value to the lessee? To propound the question is to furnish the answer.

That being the case, the lessor seeks to be compensated for the taking of buildings which did not and never had belonged to him.

Even without the express provisions of the lease, making the lessee the owner of the buildings, the right to remove the same would entitle the lessee to some part of the compensation for same as determined by the jury.

In the case of **Poillon vs. Gerry,** 179 N.Y. 14, a suit was instituted by a lessee against the lessor, for the value of the buildings, on the leased premises, which had been appropriated by the City of New York, and in the appropriation proceedings the value of the building was fixed at $2500.00. The syllabus of that case reads as follows:

> "Lease – Erroneous Dismissal of Complaint in Action Based Upon Apparently Conflicting Provisions.

When apparently conflicting provisions in a lease, one that the lessor should be entitled to any award for the premises if taken by the public authorities, and the other giving the lessee the right to remove the buildings on the premises at the expiration of the term, may be so reconciled as to give each its proper effect, it is erroneous, in an action by the lessee against the lessor to recover the amount awarded and paid to him by the municipal authorities for the buildings, to dismiss the complaint in the absence of other evidence showing title to the buildings in the defendant." In its opinion the Court said:

"If the plaintiff was not entitled to the direction of a verdict in his favor, he had at least the right to have the case submitted to the jury."

The present case is much more favorable to the lessee on the facts as the ownership of the buildings was definitely established by the terms of the lease.

Counsel for the lessor argue that the lessee had breached his contract by a failure to pay rent after the appropriation action was determined and that the lessor might have declared a forfeiture. This argument fails in view of the rule that where the whole of the leased premises is taken under eminent domain, the tenant is under no obligation to pay rent accruing after condemnation. Sec. 3 ALR 2d, 286.

It is argued that the term "buildings" as used in the lease is synonymous with the term "structures" as found in the jury verdict. With this the Court cannot agree. Buildings may be removable without material damage to the land, but structures such as driveways, curbing, sidewalks, underground wiring, etc., of course are not susceptible of removal without serious damage to the land itself. That was no doubt why the ownership and right to re-

move improvements was confined to buildings by the terms of the lease.

In fixing the value of the structure, it must be concluded that the jury not only included the buildings but also the site improvements which manifestly the parties to the lease did not contemplate would be moved.

Also it is clear that the jury did not consider the value of the buildings as separated from the land or to be separated therefrom, but as attached to and to remain a part of the premises. Considered as such, their value was considerably higher than if it had been based on a condition of separation.

The jury fixed the value of the land at $20,000.00 and of the structures at $24,500.00. Of this latter amount, the only evidence as to the value of the so-called site structures was that offered by Mr. Neff, called by the City as an expert witness. His testimony was that these improvements should be valued at $5,164.00, which amount subtracted from the total valuation of all the structures, leaves $19,336.00 as the value placed on the buildings themselves.

There is no claim that the buildings would be worth that amount or anywhere near the same, if removed; in fact, from the evidence it must be concluded that the cost of removal would be such as to make the removal almost prohibitive. However, as before pointed out, it seems entirely inequitable to allow the lessor the full value of the buildings as fixed by the jury when the buildings were not his property. Had the lessor removed those buildings prior to the condemnation, as he could well have done, the lessor would have been awarded the value of the land plus the site improvements or a total of $25,164.00.

On the other hand, it would seem to be equally inequitable to allow the lessee the full value of the buildings as fixed by the jury when that value necessarily was based on their connection with and attachment to the

land, and the Court, therefore, concludes that the only equitable and fair approach to a solution of the claims presented is to make a division on a fifty-fifty basis, that is, allow each party one-half of the value of the buildings.

On this basis the lessee would be entitled to $9,668.00, plus the damage resulting from the termination of the lease.

Since this is virtually agreed to be the sum of $5,850.00, the lessee would be entitled to a total of $15,518.00, and the lessor to the balance of the total award or $28,982.00.

The Court so finds and an entry may be drawn accordingly, saving such exceptions as may be desired.

Dana F. Reynolds, Judge

APPEARANCES:

George E. Tyack and G. Arlowe Bryant, Attorneys for DeLay, et al., Lessors John D. Duffy and Edmund M. Kagay, Attorneys for Manes, Lessee.